In The
Supreme Court of the United States

October Term, 1976

No. 76-856

SOUTHERN CONCRETE COMPANY,
Petitioner

vs.

UNITED STATES STEEL CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

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United States Steel Corporation hereby respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I. STATUTES INVOLVED

In addition to those statutes mentioned in the petition of

Southern Concrete Company, Rule 56 (e), Fed. R. Civ. P., is involved in this case.

II. QUESTIONS PRESENTED FOR REVIEW

1. Whether this plaintiff may maintain an action under Section 4 of the Clayton Act, 15 U.S.C. § 15, based upon alleged tying or reciprocal dealing or exclusive dealing arrangements between defendant and a third party where plaintiff is neither a party to the alleged arrangements nor a seller of the product subject to the alleged arrangements.

2. If the above question is answered in the affirmative, whether this petition should be denied in any case since, as found by both lower courts, petitioner failed to offer any evidence to support its allegations of either "injury" from or "causal relationship" to the violations alleged, in its opposition to respondent's motion under Rule 56, Fed. R. Civ. P.

III. STATEMENT OF THE CASE

A. Proceedings Below

The original complaint in this action was filed on July 14, 1971, by Southern Concrete Company (hereinafter "Southern") against three defendants including United States Steel Corporation (hereinafter "USS") and Williams Brothers Concrete, Inc. (hereinafter "Williams"). An amended complaint was filed on November 24, 1971. These complaints alleged causes of action based upon multiple violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, every facet of Section 2 of the Sherman Act, 15 U.S.C. § 2, Sections 2(a), (d), (e) and (f) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d), (e), and (f), Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

After a period of over three years of voluminous and extensive discovery by the parties, USS moved for partial

summary judgment based on certain legal and factual deficiencies in Southern's claims.[1] The motion was granted in part and denied in part.[2]

Of the myriad issues originally raised by Southern, and rejected by judge and jury below, Southern's petition continues to press only its claim that it was in some way injured by certain alleged tying agreements, reciprocal dealing arrangements and exclusive dealing arrangements concerning the sale of *cement* by USS to its customer, Williams, a ready-mix concrete producer.[3] Specifically, petitioner alleged that USS guaranteed bank loans on Williams' behalf on condition that Williams purchase cement from USS, and claimed that this conduct amounted to a tying arrangement, exclusive dealing and reciprocity in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and, further, that this conduct, assuming it occurred, caused injury to Southern.

USS has consistently denied even the existence of such activities but, for purposes of the summary judgment motion, took the position that even if Southern could prove the existence of, for instance, a tying violation in cement sales, that such activity between USS and Williams could not affect, much less injure, Southern since Southern neither manufactured cement in competition with USS nor bought cement subject to the alleged restraints.

In responding to the summary judgment motion of USS, Southern chose to ignore the provision of Rule 56(e), Fed. R. Civ. P., which required Southern to set forth "specific

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[1] As the Fifth Circuit noted: "We feel it appropriate to state that this is not the usual summary judgment case. When the partial summary judgment was granted there had been extensive discovery and the facts were well established, as will be seen by reference to the opinion of the district court." Petitioner's App. A., p. 12.

[2] Petitioner's App. B.

[3] Ready-mix concrete consists of cement, aggregate, water and chemical additives.

facts" which would have shown, or even tended to show, that any tie-in, reciprocity or exclusive dealing between USS and Williams caused any injury to it. Instead, Southern urged the District Court to construe the standing requirements of Clayton Section 4 liberally and to reserve all allegations of causation for the jury. Recognizing this deficiency, among others, the District Court found that:

> Plaintiff's assertions of injury in its brief are general allegations of injury due to an alleged conspiracy between USS and Williams Brothers to restrain trade in and to monopolize the ready-mixed concrete market; it makes no attempt to specify injuries to it due to the alleged tying, exclusive dealing or reciprocal dealing arrangements.

Petitioner's App. B., p. 25. The Fifth Circuit concurred, stating:

> Rather than coming forward with credible evidence to support its allegation of injury—the *sine qua non* for stating a cause of action by a private antitrust plaintiff, [citation omitted]—Southern Concrete chose to rely on the statement by the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458, 464 (1962), that summary disposition is not favored in antitrust cases. In *Poller* the Court was considering charges of conspiracy to restrain trade; such charges normally require proof of specific intent and necessitate trial. There is no such requirement of proof with regard to the alleged antitrust violations involved in this appeal. *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F. 2d 658, 667 (2d Cir. 1974). Southern Concrete may not "bootstrap [its] hollow claim of an anticompetitive effect into a triable issue by relying on" *Poller. Coniglio v. Highwood Services, Inc.*, 495 F. 2d 1286, 1292 (2d Cir. 1974), *cert. denied*, 419 U.S. 1022, 95 S. Ct. 498, 42 L. Ed. 2d 296 (1974). Mere conclusory allegations of an antitrust violation will not suffice to defeat a motion for summary judgment. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F. 2d 389 (5th Cir. 1976). (footnote omitted).

Petitioner's App. A., pp. 11-12.

Subsequent to the trial court's ruling on USS' motion, the case proceeded to trial. The ruling of the District Court did not encumber Southern's right to present evidence[4] and following a complete trial the jury found that USS had violated neither Section 1 nor Section 2 of the Sherman Act.[5]

The judgment of the District Court was affirmed on appeal.[6]

B. Present Posture of Case and Relevant Facts

Petitioner's statement of the facts pertaining to this case is dedicated, in the main, to attempting to support the argument that the violations alleged actually *existed*. That issue has never been before either of the lower courts. For purposes of its summary judgment motion, USS assumed *arguendo* that the violations occurred as alleged.

The pertinent facts, as assumed for purposes of the motion and as ultimately tried, are straightforward and undisputed: USS, among others, sold *cement* to Williams; USS guaranteed certain bank loans obtained by Williams (which Williams subsequently repaid); Southern and Williams competed in the sale of *ready-mix concrete* in the Atlanta, Georgia market; Southern did not sell *cement* and did not purchase cement from USS. Southern, in short, attempted to assert a tying claim against a supplier to its competitor.

Having lost in both courts below, Southern's petition raises

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[4] Petitioner's App. B., p. 28.

[5] *See* Petitioner's App. A., p. 5, n. 4.

[6] Petitioner's App. A.

essentially two issues.[7] The first is the legal question whether Southern has standing to pursue such a cause of action. The second is not addressed by the petition itself, but relates to the state of the record in that Southern failed to observe Rule 56(e), Fed. R. Civ. P., and is alone dispositive. In other words, even if it is assumed that there is some legal theory on which to base Southern's standing, its failure to make a factual showing of any way in which the alleged violations could have conceivably caused the injury claimed leaves this Court without any factual record which would justify consideration of the above legal issue.

IV. ARGUMENT

A. Petitioner's Failure To Offer Evidence As To The Elements Of "Causation" and "Injury" In Responding To The Motion Of USS For Partial Summary Judgment Forecloses Petitioner From Now Obtaining Review By This Court Of The Legal Requirements For Standing Under The Antitrust Laws

This action proceeded through extensive discovery for over three years prior to the filing of the partial summary judgment motion by USS. The motion addressed itself to a few of the issues where it had become apparent that there was no evidence of injury resulting from the alleged violations. After thorough consideration, the District Court found that there was indeed no showing of a relationship between the claimed injury and the violations alleged. Petitioner's App.

[7]Two additional issues, articulated for the first time in this petition, should be noted. Petitioner contends that it should have been entitled to a jury instruction that a *per se* violation of § 1 of the Sherman Act may be considered evidence of specific intent necessary to establish an attempt to monopolize in violation of § 2. Petition, pp. 17-18. Regardless of the merits of petitioner's contention, the record does not reflect that any such argument was made in the District Court, and petitioner did not present this issue to the Court of Appeals. Secondly, respondent is unable to respond to petitioner's claim that Amendment VII of the United States Constitution is somehow involved in this case, Petition, p. 3, since Southern's petition does not argue this point.

B., p. 25. On appeal, the Fifth Circuit concurred in finding this to be among the deficiencies fatal to petitioner's claim. Petitioner's App. A., pp. 11-12. In light of these conclusions by both courts below, this petition becomes subject to the Court's ruling in *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968). There the Court approved the grant of summary judgment where plaintiff failed to offer significant probative evidence tending to support its allegations. Mr. Justice Marshall concluded:

> To the extent that [plaintiff's] burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 289-90.

USS respectfully submits that petitioner's legal arguments are futile because they are made in a factual vacuum. Petitioner's failure to offer any facts in response to respondent's motion, as required by Rule 56(e), Fed. R. Civ. P., should thus preclude further consideration by this Court.

B. The Courts Below Properly Analyzed The Causal Relationship Between The Alleged Injury And Violation And Correctly Denied Petitioner's Standing

The issue of standing under Section 4 of the Clayton Act is a legal question for resolution by the court. Despite the various expressions of the rule used by different District

Courts and Courts of Appeal, the basic inquiry appears to be the same: Do the facts indicate a sufficient nexus between the particular violation alleged and the particular injury alleged to justify recovery if the violation is proved.

It cannot be disputed that this has presented difficult questions to the courts, but the issue is commonly resolved by focusing on the particular anticompetitive effect the alleged violation was intended to prevent, and determining the relationship between the claimant and the offensive conduct. Such an inquiry is, of necessity, dependent on the facts of each case. *S.C.M. Corp. v. Radio Corp. of America*, 407 F.2d 116 (2d Cir. 1969). Both courts below, having made this analysis, concluded as a matter of law that petitioner could not have been injured by the alleged conduct, and consequently petitioner had no standing under § 4.

The correctness of these results becomes evident when one considers that the violations pertinent to this petition are not general conspiracy claims which could have potentially broad effects but alleged illegal tying agreements, and reciprocal dealing and exclusive dealing arrangements, each of which has specific and limited anticompetitive effects. This Court has concisely defined a tying arrangement as:

> [A]n agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . .

Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The evils which may be inherent in a tying agreement are limited to (1) the restraint on competition between competitors dealing in the tied product; (2) the restraint on competition at the purchaser level since the purchaser who is a party to the agreement is forced to forego his free choice among competing products. *Id.* at 5-6.

An exclusive dealing arrangement is one in which a seller and a purchaser agree that the purchaser will buy certain

goods only from the seller. Coercive reciprocity resembles a tie-in, since there is coercive use of power in one market to gain sales in another. Like the tie-in, the anticompetitive effect of both exclusive dealing and coercive reciprocity is twofold: (1) the customer is forced to buy from a particular supplier when he might not do so if left to his own devices; and (2) competitors of the seller are foreclosed from selling to that customer. *See, e.g., FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Airco, Inc.*, 386 F. Supp. 915 (S.D.N.Y. 1974); *W. L. Gore & Assoc. v. Carlisle Corp.*, 381 F. Supp. 680 (D. Del. 1974).

Due to the similarity of exclusive dealing, reciprocity and tie-ins, the same basic facts can often be argued to support all three possible violations, just as petitioner attempts to do in this case. Moreover, and of primary importance in determining petitioner's lack of standing to assert these claims, the prohibited anticompetitive effect of all three is virtually identical. Therefore, this opposition brief will focus on the alleged tie-in since the same reasoning will apply to each of the three claims.

The entire crux of the rules governing illegal tying arrangements is directed at freeing competition in the tied product. *See, e.g., Northern Pac. Ry. v. United States, supra* at 5-6; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953) (injury is one "resulting in economic harm to competition in the 'tied' market"); *Wendkos v. ABC Consol. Corp.*, 397 F. Supp. 15, 17 (E.D. Pa. 1974); *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F. 2d 52, 58 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) ("the vice of an illegal tie-in is the fact that the agreement or the effect thereof lessens competition in the tied product.") It follows, *a fortiori*, that in an illegal tying situation relief is afforded to competitors dealing in the tied product and to the purchaser who was coerced into the tying arrangement.

There has not appeared to be any dispute between the

parties as to these points. Neither is there any dispute between the parties over the proposition that there are limitations inherent in Clayton § 4 upon who may pursue a claim under the antitrust laws since Congress did not intend to provide a remedy in damages for all injuries that might theoretically be traced back through a long chain of events to an antitrust violation. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n.14 (1972). Petitioner argues, however, that in the particular fact situation alleged by Southern and under the particular violations claimed by Southern, the concept of standing was not extended far enough.

Southern's petition seeks to broaden the standing test for tying claims beyond that approved by any court by establishing that there is an "area of the economy" affected by tie-in sales other than in the tied product which, here, is cement. Petitioner would have this court extend the affected area to all sellers of ready-mixed concrete who competed with the allegedly tied customer of USS.[8] USS submits that such an extension is not warranted by either the record in this case or the applicable law. No case of which respondent is aware, and no case cited by petitioner, has analyzed a tying violation so as to give standing to a competitor of the customer subject to an alleged tie.

Further, Southern seeks sanction by this Court of a rule which would effectively require that *every* issue of standing be submitted to a jury. By urging that the test is one of literal "foreseeability," petitioner would have all standing questions reduced solely to issues of fact; there would always be a jury question on how far an actor could or should foresee the consequences of his action. Such a simplistic approach

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[8]Throughout this litigation, petitioner has relied on *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). There, a customer subject to an alleged tying arrangement sued its supplier. Standing was not in issue. Here petitioner urges a theory which would extend standing to *competitors* of Fortner.

may have some application in some tort actions, but has no place in antitrust analysis since it ignores both the inherent limitations within Clayton § 4 and the practicality of having to determine a cut off point in the otherwise indefinite theoretical chain of causation which extends from *every* given act. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976); Pollock, *Standing to Sue, Remoteness of Injury, and The Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 9 (1966). Petitioner's test, applied to the record in this case, would additionally have the undesirable necessary effect of seriously undermining *First National Bank v. Cities Service Co., supra*, and reducing judicial control of antitrust litigation.

Finally, petitioner argues that uncertainty concerning the tests for standing, and particularly the handling of this issue by the Fifth Circuit, has resulted in a "chilling" and "devastating" effect on private enforcement of the antitrust laws. As support for this proposition, petitioner observes that "between April 25, 1974, and July 16, 1976, not one plaintiff passed the Fifth Circuit Test," seeming to imply that this test has become insurmountable. Petitioner has apparently overlooked recent Fifth Circuit opinions in which standing has been conferred utilizing the same test applied in this case, *Tugboat, Inc. v. Mobile Towing Co.*, 537 F. 2d 1172 (5th Cir. 1976); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F. 2d. 1347 (5th Cir. 1976), as well as the very active docket of antitrust matters before the Fifth Circuit during that period where standing was obviously conferred on numerous plaintiffs; these citations would be too numerous to list.

V. CONCLUSION

USS respectfully submits that Southern's petition must be denied since (1) petitioner in this case could not have been injured by the specific violations alleged, (2) even if

petitioner could have been injured, its injuries would be so remote and removed from the alleged violations that they could not have occurred "by reason of" the violations under Clayton § 4, and (3) even if petitioner could have been directly injured, it has not come forward with any credible evidence tending to show that it was injured.

Therefore, United States Steel Corporation respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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/s/ Joseph R. Gladden, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I have made due and legal service of the foregoing Brief for Respondent United States Steel Corporation in Opposition in compliance with Rule 33(1), Rules of the Supreme Court of the United States, by mailing three printed copies thereof to Petitioner's counsel of record,

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by causing said copies to be deposited in the United States mail, properly addressed, with sufficient air mail postage affixed thereto.

This 21st day of January, 1977.

/s/ Curtis L. Frisbie, Jr.
Curtis L. Frisbie, Jr.

Attorney for Respondent and a Member of the Bar of This Court

APPENDIX

Section 1 of the Sherman Act, 26 Stat. 209 (1890) as amended 50 Stat. 693 (1937); 69 Stat. 282 (1955), 88 Stat. 1708 (1974), 15 U.S.C. § 1 (1975).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1952).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Fed. R. Civ. P. 56 (e).

Summary Judgment

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party

may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.